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Gray Davis
Governor

July 6, 2000

TO: PERSONS TO EXCHANGE INFORMATION FOR HEARING ON
APPLICATION 30532

ORDER QUASHING SUBPOENA OF CLIENTS OF MR. MALONEY

As part of an adjudicative proceeding on a water right application filed by the Monterey County Water Resources Agency (MCWRA), Application 30532, Mr. Patrick Maloney, attorney for a group of protestants which has been named "Salinas Valley Protestants," (protestants) issued a subpoena duces tecum (subpoena) to MCWRA. Two items that the protestants have requested that MCWRA produce pursuant to the subpoena are "all water extraction reports" (item 1) and "all water conservation reports" (item 2). MCWRA filed a Motion to Quash the Subpoena of Clients of Mr. Maloney (motion) as to items 1 and 2. MCWRA provided documents responsive to the other requests contained in the subpoena and they are not at issue in this motion.

A hearing was held on June 28, 2000, to provide an opportunity for the parties to present oral argument in accordance with Code of Civil Procedure section 1987.1. As hearing officer for the hearing on the motion and for the hearing on Application 30532 of MCWRA, I must resolve the motion. (Gov. Code, § 11450.30, subd. (b).) I read all briefs submitted prior to the hearing and I listened to the arguments given at the hearing.

Issues

MCWRA raises three issues in its motion:

1. The information requested in the subpoena is not relevant to the issues noticed for hearing on Application 30532.
2. The information requested in the subpoena is confidential by MCWRA ordinance 3717 and is protected by an outstanding order of the Monterey County Superior Court.
3. The subpoena is not valid because it was not served properly, not accompanied by a proof of service, and not accompanied by an affidavit.

Discussion

Relevance

California Environmental Protection Agency

MCWRA ordinance 3717 requires the annual reporting of groundwater extraction data and water conservation information on forms provided by MCWRA. The information reported is compiled in the MCWRA's Groundwater Extraction Management System (GEMS) database.

Pursuant to an order of the Monterey County Superior Court (Order on Motion to Compel Production of Well Extraction Data, *Orradre Ranch, et al. v. Monterey County Resources Agency*, No. 115777), Mr. Maloney has been given the water extraction data in the GEMS database aggregated by township and range without the personally identifiable portions. The court order does not address the conservation data.

The protestants contend that the groundwater extraction data and the water conservation data (items 1 and 2 in the subpoena) are relevant for four purposes:

1. To rebut MCWRA's water availability analysis;
2. To establish the protestants' conjunctive use of water in the Salinas Valley;
3. To "optimize" the water resources of the Salinas Valley; and
4. To determine how much water each person in the Salinas Valley should be allowed to pump.

The amount of water extracted from and conserved in the Salinas Valley groundwater basin may be relevant to the water availability issue noticed for the hearing on Application 30532. Water is not available for appropriation to the extent it deprives groundwater users of recharge on which they depend. The recharge serves groundwater extractors as a group, however, and it is the amount extracted in the aggregate – data that have already been made available to Mr. Maloney - not the amount extracted by any individual user, that is relevant to the inquiry. The personally identifiable portions of the reports in which extraction and conservation data are recorded are not relevant to any of the issues noticed for hearing.

The protestants contend that the subpoenaed data are needed as a matter of fundamental fairness to test the accuracy of the calculations, assumptions, and methodology used in MCWRA's water availability analysis. MCWRA developed and uses the Salinas Valley Integrated Groundwater and Surface water Model (SVIGSM) as a planning tool to analyze the hydrogeology of the Salinas Basin. MCWRA did not use the data in the GEMS database to develop or calibrate the SVIGSM. (Reply Brief, Exhibit A.) MCWRA did not use the GEMS database in developing its testimony, exhibits, or analysis for the hearing on Application 30532. (Reply Brief, Exhibit B.)

The protestants also contend that they need the subpoenaed information to establish their conjunctive use of water in the Salinas Valley. The protestants can use their own extraction and conservation data to show their use. The personally identifiable portions of the reports submitted by other groundwater users is not relevant to that issue.

The protestants contend that they need the subpoenaed information to enable the State Water Resources Control Board (SWRCB) to “optimize” the water resources of the Salinas Valley. The protestants contend that the SWRCB needs the subpoenaed information to develop a “rational solution” to the water problems in the the Salinas Valley. Neither optimizing the water resources of the Salinas Valley nor solving all of the water problems in the Salinas Valley is within the scope of the hearing on Application 30532. The purpose of the hearing on Application 30532 is to determine whether there is water available for the project described in the application. The subpoenaed information is not relevant to issues that are within the scope of the hearing.

The protestants contend that they need the subpoenaed information to determine how much water each person in the Salinas Valley should be allowed to pump. A determination of the amount of water each person should be allowed to pump would require an adjudication of the water rights of the Salinas Valley. An adjudication of water rights is outside the scope of the hearing and the subpoenaed information is not relevant to resolution of the issues noticed for the hearing on Application 30532.

The protestants have failed to establish the relevance of the subpoenaed information to the issues within the scope of the hearing.

Confidentiality

As described above, MCWRA ordinance 3717 requires the annual reporting of groundwater extraction data and water conservation information on forms provided by MCWRA. Section 1.01.13 of ordinance 3717 states that:

“The Agency shall restrict access to and distribution of personally identifiable information consistent with privacy protections and requirements and trade secret protections.”

Pumpers have relied on the confidentiality provision in complying with the ordinance. Without the confidentiality provision in the ordinance and promises of confidentiality made by MCWRA to the growers, it is doubtful that growers would submit the information. Many growers consider the information required to be submitted to be a trade secret. MCWRA needs the cooperation of the growers to get the information it needs to manage the water resources within its jurisdiction.

Section 1.01.02 of ordinance 3717 describes the purpose of the ordinance. The purpose includes:

1. Determine actual amounts of water extracted from the basin.
2. Provide information that can be used to develop demand management programs created by an inadequate water supply.
3. Facilitate and encourage water conservation by monitoring water use patterns and practices.

4. Facilitate the development of new water supplies by using the data collected to determine whether new water projects are necessary.
5. Allow MCWRA to allocate the costs of water management activities in the Salinas Basin and any new water projects for the basin, based on actual water use.

The success of MCWRA in managing the water resources within its jurisdiction depends on the cooperation of the pumpers in complying with ordinance 3717. Compliance with the ordinance depends on the promise to maintain the confidentiality of the information submitted. Without compliance, MCWRA is unable to use a valuable management tool. The protestants have not demonstrated that their need for the personally identifiable information outweighs the need of MCWRA to keep this information confidential.

The protestants contend that the SWRCB has waived the confidentiality of the subpoenaed data because it “ordered the Agency to craft a water availability analysis” and “[b]y ordering such an analysis to be placed into the public record, the Board has already determined that the confidentiality of water data is outweighed by the Board’s statutory responsibility to determine whether water is available to the Agency.” Neither statement is true. In fact, the SWRCB neither waived confidentiality nor made any determination as to whether other considerations outweighed the need to maintain confidentiality. SWRCB staff merely informed MCWRA, by letter dated March 26, 1999, that MCWRA must submit information that demonstrates a reasonable likelihood that unappropriated water is available for appropriation under Application 30532. There is no correspondence or any other documentation in the files to show that the SWRCB considered or made any determination regarding the confidentiality of data submitted pursuant to ordinance 3717.

Validity of Subpoena

MCWRA contends that the subpoena was not served properly, not accompanied by a proof of service, and not accompanied by an affidavit as required by law.

Government Code section 11450.20, subdivision (b), provides three ways to issue a subpoena: personal service, certified mail, and messenger. Messenger service was used to issue the subpoena. A copy of the written notation of acknowledgment of the subpoena, required by Government Code section 11450.20, subdivision (b), was not served on the parties or the SWRCB, but service of the acknowledgment is not required. MCWRA obviously received the subpoena. Failure to file proof of acknowledgment does not invalidate the subpoena. Proof of service of the subpoena was served on the SWRCB.

Code of Civil Procedure section 1985, subdivision (b), requires service of an affidavit with the subpoena. (See also Gov. Code, § 11450.20, subd. (a); 25 Cal.L.Rev.Comm. Reports 55 (1995).) The affidavit must include the following:

1. Show good cause for the production of the documents described in the subpoena.
2. Specify the exact documents requested to be produced.

3. Set forth in full detail the relevance of the desired documents to the issues noticed for hearing.
4. State that the MCWRA has the desired documents in its possession or under its control.

An affidavit was not served with the subpoena issued to MCWRA. Failure to serve the required affidavit at the time the subpoena is served invalidates the subpoena.

The protestants contend that an affidavit is not required and that the SWRCB's subpoena form allows a subpoena for documents without an affidavit. Contrary to the protestants' contention, the SWRCB's subpoena form provides notice of the necessity of an affidavit. (See SWRCB subpoena form at page 1, part 2 (a) and page 2, part 1.) The protestants cite Code of Civil Procedure sections 1985, subdivision (b), and 2020 as support for their contention that an affidavit is not required. The sections cited by the protestants do not support their contention.

Code of Civil Procedure section 1985, subdivision (b) requires an affidavit be served with a subpoena duces tecum. Subdivision (b) of section 1985 states: "A copy of an affidavit shall be served with a subpoena duces tecum issued before trial..." (emphasis added).

Code of Civil Procedure section 2020 does not apply to a subpoena duces tecum; it only applies to a deposition subpoena for the production of business records for copying. Section 2020 does not require service of an affidavit with the subpoena if the subpoena commands only the production of business records for copying. (Code Civ. Proc., § 2020, subd. (d)(1).) The subpoenaed information is not a business record because the water extraction reports and the water conservation reports were not prepared by MCWRA. (Evid. Code, § 1561, subd. (a)(3).) Accordingly, section 2020 does not apply.

The subpoena is not valid because Mr. Maloney failed to serve the required affidavit as required by Code of Civil Procedure section 1985, subdivision (b). Failure to provide the SWRCB and the parties with proof of service showing the manner of service does not invalidate the subpoena. Although failure to obtain the required written notation of acknowledgment may also call into question the validity of a subpoena, I do not believe the subpoena should be quashed on that basis, however, because there is no dispute regarding receipt of the subpoena and no indication that any party was prejudiced by the omission.

Conclusion

I find that:

1. The information requested in items 1 and 2 of the subpoena is not relevant to the issues noticed for the hearing on Application 30532.
2. The information requested in items 1 and 2 of the subpoena is confidential and should not be disclosed to the protestants.

3. The subpoena is not valid for failure to serve the affidavit required by Code of Civil Procedure section 1985, subdivision (b).

Accordingly, the motion to quash is granted. The subpoena is quashed as to items 1 and 2.

If you have any questions regarding my ruling, please contact Barbara Katz at (916) 657-2097.

Sincerely,

ORIGINAL SIGNED BY:

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Hearing Officer

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List of Persons to Exchange Information

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July 18 and 19, 2000, to be continued if necessary, on July 24, 25 and 26, 2000
(dated June 6, 2000)**

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